FILE COPY

FILED
JUN 26 1950
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1949

No. 149

STATE OF OHIO on the relation of
JOSEPH M. GREISIGER, LLOYD PUSE,
CLIFFORD H. SMITH, et al.
Petitioners

v.

GRAND RAPIDS BOARD OF EDUCATION,
JOSEPH CULBERTSON, JOHN THOMAS, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

HAYDEN C. COVINGTON
Counsel for Petitioners

INDEX

Subject Index

	PAGE
Title and number of cause	1
This Index	i-v
Petition for a Writ of Certiorari	1
Opinion below	2
Jurisdiction	2
Question presented	2
No sufficient non-federal question involved	3
How question raised	3
Statutes and regulations involved	4
Statutes	4
Regulations	6
Statement	7
Specification of errors to be urged	14
Reasons relied on for granting of writ	15
I	15
II	19
III	23
IV	26
V	26
VI	27
Conclusion	30

Cases Cited

Baggerly v. Lee 37 Ind. App. 139, 73 N. E. 921 (1905)	23
Bigelow v. Spiegel 22 O. C. C. N. S. 337, 43 O. C. C. 595	29
Cantwell v. Connecticut 310 U. S. 296, 310	21
Danskin v. San Diego Unified School District 28 Cal. 2d 536, 171 P. 2d 885	22-23

PAGE

Darr v. Burford
70 S. Ct. 586, 602 18
Davis v. Boget
50 Iowa 11 (1878) 23
Everson v. Board of Education
330 U. S. 1 ..... 24, 25
First Nat'l Bank v. Botkins
141 Ohio St. 437, 250 O. O. 576, 48 N. E. 2d 865 28
Gibbert v. Dilley
95 Neb. 527, 145 N. W. 999 23-24
Girard Trust Co. v. Helvering
301 U. S. 540, 543 29
Girouard v. United States
328 U. S. 61 21
Greenbanks v. Bantwell
43 Vt. 207 (1870) 24
Hague v. C. I. O.
307 U. S. 496 ..... 25, 28
Hannegan v. Esquire
327 U. S. 146 ..... 19, 22
Homan v. Board of Embalmers
135 Ohio St. 321 28
Hurd v. Walters
48 Ind. 148 (1874) 23
Jamison v. Texas
318 U. S. 413 25
Lagow v. Hill
238 Ill. 428, 87 N. E. 369 (1909) 24
Leonard & Leonard v. Earle
279 U. S. 392 18
Litchfield v. Register and Receiver
9 Wall. 575, 577 29

PAGE

Marsh v. Alabama
326 U. S. 501 25
Martin v. Struthers
319 U. S. 141, 142 ..... 2, 14
McCollum v. Board of Education
333 U. S. 203, 205, 209, 212 ..... 3, 24, 25, 30
Mooney v. Holohan
294 U. S. 103, 113 27
Murdock v. Pennsylvania
319 U. S. 105, 1[illegible] 21
Mutual Home & Savings Assn. v. Merion
67 Ohio App. 439, 37 N. E. 2d 109, 119 29
Nichols v. School Directors
93 Ill. 61 (1879) 23
Philippines, The People of the, v. Fernandez
1948 Lawyers Journal 295 24
Robb v. Connolly
111 U. S. 624, 637 27
Schneider v. New Jersey
308 U. S. 147, 162 ..... 25, 27
School Directors v. Toll
149 Ill. App. 541 (1909) 23
Skinner v. Oklahoma
316 U. S. 535 26
Southern Pacific Terminal Co. v. I. C. C.
219 U. S. 498 18
Townsend v. Hagan
35 Iowa 194 (1872) 23
United District Heating Inc. v. State Office Building Commission
124 Ohio St. 413, 415-416 28
United States v. Hillyard
52 F. Supp. 612 21

PAGE

Weaver v. Ohio State University
126 Ohio St. 290, 185 N. E. 196 28

Weir v. Day
35 Ohio St. 143 (1878) 28

West Virginia State Board of Education v. Barnette
319 U. S. 624 21

Wilbur v. United States
281 U. S. 206, 218-219 29

Williams v. Kaiser
323 U. S. 471, 477-479 3

Yick Wo v. Hopkins
118 U. S. 356 26

STATUTES CITED

Ohio Constitution 28

Ohio General Code
Section 4839 4
Section 4839-1 ..... 4-5, 19, 20
Section 4839-2 ..... 5, 19, 20
Section 4839-4 5

Selective Training and Service Act of 1940
Section 5 (g) (54 Stat. 885, 50 U. S. C. App. 305) .. 21
Section 6 (j) (62 Stat. 609, 50 U. S. C. App. 456) .. 21

United States Code, Title 28, Section 1257 (3) 2

United States Constitution
Amendment I 2, 3, 14, 15, 17, 18, 22, 23, 24, 25, 26
Amendment XIV 2, 3, 14, 15, 22, 26, 28

	PAGE
5 A. L. R. 886	24
7 A. L. R. 791	24
52 A. L. R. 249	24
86 A. L. R. 1181	24
161 A. L. R. 1308	24
21 Minnesota Law Review 744	28
94 University of Pennsylvania Law Review 125-147, "Federal Jurisdiction to Decide Moot Cases"	18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.

STATE OF OHIO on the relation of
JOSEPH M. GREISIGER, LLOYD PUSE,
CLIFFORD H. SMITH, et al.
Petitioners

v.

GRAND RAPIDS BOARD OF EDUCATION,
JOSEPH CULBERTSON, JOHN THOMAS, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Hayden C. Covington, on behalf of Joseph M. Greisiger, Lloyd Puse, Clifford H. Smith and others, seeks the issuance of a writ of certiorari to review the judgment of the Supreme Court of Ohio, deciding that no constitutional question was involved in this case.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion and the judgment of that court is not reported. The judgment appears in the record. (2-3)[1] The Court of Appeals of Ohio wrote an opinion. It is unreported (Vol. 55, Court of Appeals Opinions, Sixth District, p. 71); it also appears in the record. (10-18) The Court of Common Pleas wrote an opinion. The unreported opinion appears in the record. (34-44)

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on February 15, 1950. (2-3) On the 11th day of May, 1950, this Court ordered the time for filing the petition for writ of certiorari extended to and including July 1, 1950. (229)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. § 1257 (3). See Note 2, *Martin* v. *Struthers,* 319 U. S. 141, 142.

QUESTION PRESENTED

Whether the construction of an Ohio statute allowing use of school auditoriums for religious meetings, so as to approve the denial of an application for a religious meeting at a proper time in the school on the ground that the religious assembly was prohibited by the doctrine of separation of church and state found in the state and federal constitutions, abridges the rights of petitioners to freedom of assembly, freedom of worship and freedom of speech, contrary to the First and Fourteenth Amendments

[1] Figures appearing herein within parentheses refer to pages of printed transcript of record.

to the United States Constitution, especially when other religious organizations are permitted to use the auditorium.

NO SUFFICIENT NON-FEDERAL QUESTION INVOLVED

The action was for mandamus. This was the only appropriate remedy. The writ of mandamus was, nevertheless, denied because it was held that the refusal to issue the permit by the school board was discretionary. The petitioners were therefore held to be without remedy.

The discretion of the school board does not prevent this Court from reviewing the unconstitutionality of the state action by the school board and the courts here complained of.

The ground of discretion is not a substantial or sufficient one. *Williams* v. *Kaiser,* 323 U. S. 471, 477-479. Mandamus and discretion were involved in *McCollum* v. *Board of Education,* 333 U. S. 203.

HOW QUESTION RAISED

By petition for writ of mandamus, it was contended that petitioners were being deprived of their rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. (24, 29, 30, 31)

The respondents contended that the use of the school by the petitioners was precluded by the doctrine of separation of church and state. (32-33)

The constitutional question was found to be properly raised by the trial court. (36-37)

The constitutional question was urged in the notices of appeal. (8-9, 19-20)

STATUTES AND REGULATIONS INVOLVED

STATUTES

The pertinent portions of the statutes follow:

"SECTION 4839. (Use of schoolhouses generally.)

"The board of education of a city, exempted village or local school district, in its discretion, may authorize the opening of such schoolhouses for any lawful purposes. But nothing herein shall authorize a board of education to rent or lease a schoolhouse when such rental or lease in any wise interferes with the public schools in such district, or for any purpose other than is authorized by law.

"SECTION 4839-1. (Schoolhouses available for educational and recreational purposes.)

"Upon application of any responsible organization, or of a group of at least seven citizens, all school grounds and schoolhouses, as well as all other buildings under the supervision and control of the state, or buildings maintained by taxation under the laws of Ohio, shall be available for use as social centers for the entertainment and education of the people, including the adult and youthful population, and for the discussion of all topics tending to the development of personal character and of civic welfare, and for religious exercises. Such occupation, however, should not seriously infringe upon the original and necessary uses of such properties. The public officials in charge of such buildings shall prescribe such rules and regulations

for their occupance and use as will secure a fair, reasonable and impartial use of the same.

"SECTION 4839-2. (Use of schoolhouses and grounds for public meetings and entertainments.)

"The board of education of any city, exempted village or local school district shall, upon request and the payment of a reasonable fee, subject to such regulation as may be adopted by such board, permit the use of any schoolhouse and rooms therein and the grounds and other property under its control, when not in actual use for school purposes, for any of the following purposes:

"1. For giving instructions in any branch of education, learning or the arts.

"2. For holding educational, religious, civic, social or recreational meetings and entertainments, and for such other purposes as may make for the welfare of the community. Such meetings and entertainments shall be non-exclusive and open to the general public.

"3. For public library purposes, as a station for a public library, or as reading rooms.

"4. For polling places, for holding elections and for the registration of voters, for holding grange or similar meetings.

"SECTION 4839-4. (Responsibility for damage; payment of actual expenses.)

"Any organization or group of citizens permitted to use the properties specified in Section 4839-1 of the General Code shall be responsible for any damage done them over and above the ordinary wear, and shall, if required, pay the actual expenses incurred for janitor service, light and heat." (General Code of Ohio)

Regulations

Before this action was instituted there was no written regulation. There was and now continues to be a custom not to allow religious organizations to use the school auditorium for religious meetings because such use produced discord in the community. (206-207)

After the action was instituted, a written regulation (not mentioning religious use) was promulgated which reads as follows:

"No. 1. At all times the auditorium is used for other than school purposes, an American flag at least three feet by five feet shall be displayed in said auditorium or suspended above the stage.

"No. 2. Any person or organization desiring to use the school building shall make application therefor to this Board made by at least seven citizens not less than thirty days prior to the date said school building is desired.

"No. 3. No continuing permit shall be granted for use of said school building and all permits so issued shall be for the use of said building for not more than two consecutive days and not more than one application will be considered from the same person, firm or organization at any one time.

"No. 4. No school building shall be permitted to be used for any unlawful purpose or for the advancement of any doctrines contrary to law.

"No. 5. All persons desiring to use the school building for non-school purposes shall pay as follows: For any damage done over and above ordinary wear and tear and they shall also pay the actual expenses incurred for janitor services, light, heat and equipment.

"No. 6. No application shall be granted to use any school building or any school grounds at any time when the same is in the actual use for school purposes or shall

such issuance in any way interfere with school in said school district.

"No. 7. No person, firm or organization shall use the school grounds or any school building for sale of any type of merchandise, commodity or printed matter until they have first secured a permit from the Clerk and shall have paid him a regulatory fee of $1.00, which shall entitle the holder to conduct such a sale or sales for a period of one year from the date thereof." (211-212)

STATEMENT

The East Unit of the Toledo Company of Jehovah's witnesses is a religious congregation existing according to law in Ohio. (56-57, 63) This congregation owns its own church or meeting place in Toledo. (46) The petitioners are the board of trustees for all the members of the congregation comprising 90 persons and the presiding minister and assistants who direct the missionary activity of Jehovah's witnesses in East Toledo and Wood County. (46-47, 63-64, 88, 101, 113, 122)

The congregation is composed of missionaries, (63-64) who preach publicly and from house to house. (47-48) The congregation holds public meetings at its meeting place as well as in all other available places of assembly in its missionary field, which includes Grand Rapids, Ohio. (47-48) The meetings are for the purpose of conducting lectures on Bible subjects and questions of public interest insofar as they relate to Bible prophecy. (57)

The policy of Jehovah's witnesses was to use school auditoriums and other meeting places in various parts of their missionary field for public meetings. (49) In 1947, petitioners wrote to the Department of Education of Ohio at Columbus inquiring whether school auditoriums were available for religious meetings. (67, 204-205) The Department of Education answered that school auditoriums of

Ohio were available for religious meetings when applied for by (1) any responsible organization or (2) a group of at least seven citizens. (205)

After receipt of the letter from the Department of Education, petitioners planned to obtain use of the high school auditorium in Grand Rapids. (67) A committee was sent by the congregation of 90 persons to Grand Rapids to engage the school auditorium. (51-64)

The committee applied to the superintendent of the schools who argued with them over their religious beliefs and added that they could not have the auditorium. (65-68) Upon their protest, the superintendent referred them to members of the school board. (66)

Later the committee visited members separately at their homes and places of business, and discussed with them the request for the use of the auditorium, but without satisfaction. (68-70, 101-103)

Later a letter was written to the board formally requesting use of the auditorium for four consecutive Sundays, stating: "These discourses will be free to the public, there will be no collection taken, or charge, or obligation on the part of any attending. These discourses or sermons are for educational purposes." (206)

On the third Monday in October, 1947, the committee met with the board to discuss the formal request. (71) They informed the board that they would pay for the cost of upkeep of the building while it was used by them and that they would pay the fees for lights and janitor service. (87, 107) They informed the board that if the specified Sundays were inconvenient then "any convenient time available and not in conflict with the school rules or anything going on there" would be satisfactory. (56, 104) Petitioners were willing to abide by all the rules of the school in respect to the use of the auditorium such as displaying the American flag, requirement that request be made by seven citizens, and not using the auditorium to advocate refusal

to vote, serve on a jury or comply with the selective service law. (58-59)

The board ruled that the school auditorium could not be used "for public meetings or any religious services". (72) The board was then shown the letter from the State Board of Education (205-206), and requested to follow the advice contained therein. In reply the board said that they did not comply with the advice from Columbus, but that "we are the law in Grand Rapids." (72, 104) On the trial, one of the members of the board admitted that the board did not pay any attention to the letter from the State Board of Education in respect to the use of the school by religious organizations. (144)

The board suggested that Jehovah's witnesses ought to make use of schools in the other districts, to which the committee replied that Jehovah's witnesses had completed their use of the auditoriums in other parts of the territory. (73)

The board members declared that it was their own belief that the law did not allow them to permit any particular religious organization to use the auditorium. It was said that the policy was to permit religious organizations to use it only in a joint meeting and then only when they could get together and agree not to disagree. (150, 154, 159-163)

The ruling of the board was not to allow Jehovah's witnesses to use the school auditorium because it would be contrary to the rule and policy of the board which forbade any one religious organization to use the auditorium. (150, 154, 159-163) The board had other reasons for denying Jehovah's witnesses the right to use the auditorium and that was that they did not constitute a "responsible organization" within the meaning of the statute. (154-158)

The petitioners admitted that the meetings on the school premises would constitute religious services and that delivery of the talks and listening to them at assemblies were

their way of worship. (96, 125) It was established that the proposed use during the time the school was not in operation was incidental and would not interfere with the school purpose and the school curriculum.

Various grounds were relied upon by the board as a basis for denial of the permit, which were either discussed at the meeting or admitted by the members upon the trial, such as failure and refusal to perform military service (135, 155, 166), refusal to salute the flag (136), failure to vote (135), belief in things not in accord with but in conflict with Americanism principles taught in the school. (140-141, 173-179, 181)

Another ground relied upon by the board for denial of the permit was that the use of the school by Jehovah's witnesses would cause the people of the community to talk and have an adverse feeling against the board and that it would cause dissension in the town. (146)

The board said that Grand Rapids did not want Jehovah's witnesses in the community and declared that Jehovah's witnesses are not worthy to be called citizens since they would not salute the flag and because of that are "not a responsible organization". (72, 105).

The board also contended that the use proposed by Jehovah's witnesses would conflict with the ordinary school use of the auditorium on account of play practice and basketball practice, but this was not substantiated by proof. (171-172, 182-184)

The committee attempted to prove to the board that Jehovah's witnesses are a responsible organization and had property in Toledo. (72-73) The board iterated its denial of the application. (73) The members of the committee were dismissed from the meeting. They left and went home. (104) The board wrote petitioners a formal letter of denial, stating: "Our board took action against it, as our school district is made up of various religious denominations and we have harmony in the community." (206-207)

In December, 1947, the congregation replied to the formal denial by registered letter. In this letter they made a more detailed formal application to use the auditorium. (207-208) In this letter the congregation said, among other things: "The purpose of these meetings are strictly educational and non-sectarian. The meetings shall be non-exclusive and open to the general public. No admission charge will be made at any of these meetings and no collections will be solicited. [¶] When we were at your board meeting it was mentioned that Jehovah's witnesses were not a responsible organization. For your information we have had the use of the 'Public Auditorium', Cleveland, Ohio in 1946; the 'Arena' at St. Louis in 1941; 'Madison Square Garden', at New York in 1939; and 'Convention Hall' at Philadelphia, Penn. in November, 1947. Locally we have had 'Fremont Ross High School', Fremont, Ohio (June 15, 1947), and December 19-21, 1947, we will have an assembly at 'Scott High School', 2400 Collingwood Blvd., Toledo, Ohio. [¶] . . . These Bible lectures tends to the development of personal character and to combat the national scourge of juvenile delinquency. . . . [¶] Jehovah's witnesses will be glad to pay the actual expense incurred for janitor service, heat and light in the use of the auditorium." (207-208) No formal written denial or reply to this letter was made. (77) Following the mailing of the registered letter to the board a hearing was had before the board at Grand Rapids on the third Monday of December, 1947. (74-75, 104) The board ruled that it was determined to defend its denial in the courts and would "even go to the Supreme Court". (75)

Almost a year passed without any written word being received from the board. The committee, representing the congregation, then made another application by letter dated November 6, 1948. (77) They also again visited the members of the board at their respective homes or places of business with no good result. (78-80) On November 17, 1948, the school board responded to the letter of November 6,

1948 as follows: "Your request for the use of the Grand Rapids Public School for the four Sundays commencing January 8, 1949 has been rejected." (210)

In December, 1948, another formal application was written to the board, requesting four specified successive Sundays commencing January 9, 1949, "or anytime thereafter as it can be conveniently arranged". (210) This letter was delivered personally to the clerk of the board. (107) No formal reply was ever made to this last application.

The petition for mandamus was filed December 20, 1948. (20, 23) The alternative writ issued on the same day. (20, 21) On that same day the board held a meeting for the purpose of considering the mandamus action and passed a resolution declaring that it "refuses the use of the school building to the relators of the said mandamus mentioned above". (213) On January 3, 1949, the school board met and adopted a resolution to resist the mandamus suit brought by Jehovah's witnesses. (211) On February 3, 1949, the respondents filed their answer. (20, 32-34)

The case was called for trial and evidence received on February 7, 8 and 9, 1949. (45) Upon the trial the above material facts were developed. The court allowed the respondents to roam into an unlimited field of hearsay and immateriality. Following the institution of the mandamus proceedings certain citizens in the community circulated various petitions among the residents of the community protesting to the school board against the use of the auditorium by Jehovah's witnesses. (127-132) The petitions were circulated and presented to the board after the board was served with the alternative writ of mandamus and shortly before the respondents filed their answer on February 1, 1949. (132)

Objection was made to the receipt of the petitions into evidence because they were the rankest type of hearsay and constituted an ex parte deposition of the citizens of the community taken without notice to petitioners after

the action was instituted. (128-129) The petitions were nevertheless received into evidence. (128, 130)

Certain resolutions of protest against the use of the school auditorium by Jehovah's witnesses were passed by local organizations of Grand Rapids, such as the Exchange Club (149), the American Legion and the American Legion Auxiliary, the Grange organization and the Parent-Teachers Association. (169). Each was dated subsequent to the date the action was instituted. (213-217) All of these protests were received into evidence over the objections of petitioners. (213-217)

At the close of petitioners' case the respondents moved to dismiss. The motion was denied. (127) At the close of the case the court took the matter under advisement and reserved decision. (203)

On April 1, 1949, the court denied the writ of mandamus. (22) In the opinion the court reviewed the history of the litigation (34-35), briefly touched upon the law of mandamus (36), declared that it was necessary to determine whether there was an unconstitutional denial of the rights of petitioners (37), reviewed the facts (37-39), adverted to the arguments and briefs (39-40), referred to the Ohio General Code opening the school buildings for civic center purposes (40-41), discussed various points of law (41-43) and decided that the school board had not abused its discretion in denying the use of the auditorium to petitioners. (43-44)

The case was duly appealed to the Court of Appeals of Ohio. (19-20) On December 5, 1949, the Court of Appeals affirmed the judgment of the trial court. (10) The opinion referred to the pleadings. (10, 12) The court stated that the question to be decided was whether the school board had discretion to deny the application and if so whether there would be an abuse of discretion. (13) The opinion relied upon the dissentient beliefs and unorthodox practices of Jehovah's witnesses as justification for the denial of the

application for the permit. (13) It reviewed the law af mandamus and concluded that discretion is granted to the board. (14-16) It found that Jehovah's witnesses are not a responsible organization because of their beliefs and practices. (15-17) It approved the receipt into evidence of the hearsay petitions and ex parte depositions. (17-18) It held that the construction of the Ohio law was "not repugnant to the state or federal constitutions" and that the construction did not "unreasonably interfere with the constitutional rights of appellants". (18)

The case was duly appealed as of right to the Supreme Court of Ohio. (8) Respondents moved to dismiss the appeal. (7) The Supreme Court dismissed the appeal on the ground that there was "no debatable question" involved. (2-3) [2]

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Ohio and the Court of Appeals of Ohio erred

(1) In holding that the statute, as construed and applied, did not abridge petitioners' rights of freedom of speech, freedom of assembly and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

(2) In holding that respondents, acting for the state, could deny petitioners' constitutional rights under the guise of exercise of discretion by an executive board.

(3) In holding that the courts could not interfere with the denial of constitutional rights by an executive board because there was no abuse of discretion.

(4) In holding that Jehovah's witnesses are not a responsible organization.

(5) In failing to hold that the denial to petitioners of

[2] See Martin v. Struthers, 319 U. S. 141, 142, note 2.

the application for the use of the school auditorium was arbitrary, capricious, an abuse of discretion and an abridgment of the rights of freedom of speech, freedom of assembly and freedom of worship guaranteed by the First and Fourteenth Amendments to the United States Constitution.

(6) In failing to hold to be erroneous the construction, placed by respondents upon the state and federal constitutions which prohibit use of state funds for sectarian purposes, that the incidental use of school buildings by religious organizations as places of assembly is forbidden.

(7) In affirming the judgment of the Court of Common Pleas of Wood County, Ohio.

REASONS RELIED ON FOR GRANTING THE WRIT

I

The decisions of the courts below disrupt and disorganize completely throughout the United States the uniform practice of using school auditoriums for civic center purposes at times when not used by the schools. For over one hundred years it has been the general practice, with or without legislative authority, to permit school buildings, when not being used for educational purposes, to be used as places of assembly for the discussion of community, state and national problems.

Included among such users, especially in the rural districts, have been and are the religious organizations. In many communities there are no buildings where religious assemblies may be had unless the school is made available. Necessity, practice, usage, custom and statute throughout this country have made available the school auditoriums for religious gatherings when the schools are not using them. On the pretext that such use constitutes a violation of the principle of separation of church and state the respondents have upset, flouted and denied this general cus-

tom and need which have never been constitutionally doubted. This denial has been on the theory that the use of the school auditorium by religious groups constitutes appropriation of public property for sectarian purposes contrary to the prohibition of such found in the state and federal constitutions.

The courts of Ohio have refused to act or disturb this erroneous administrative interpretation of the Constitution on the ground that it was within the discretion of the administrative agency, acting for the state through the respondents, to interpret the Constitution. They have said that the school board is the Supreme Court of the United States as far as a determination of whether the Constitution allows the use of school auditoriums for religious gatherings is concerned.

The effect of the decisions of the courts below and of the administrative agency represented by the respondents is far reaching. The constitutionality of the policy of forty-eight states' allowing school buildings to be used by religious organizations is imperiled. Thousands of communities and hundreds of thousands of people will be affected if the erroneous doctrine approved by the state courts below is not reviewed by this Court and determined.

The principle, if not reviewed by this Court, will give rise to further discriminations and denials. If a religious organization can be denied its right to use a school building because it is not popular with the people of the local community, then what is to prevent political campaigners, who do not reside in a community, or unpopular campaigners, from being denied the use of school buildings for purposes of political assembly?

Even more far-reaching devastation is inherent in the state approval of the doctrine that separation of church and state forbids the incidental use of school property by a religious organization. If this principle is sound, then tax exemption to churches and religious organizations in

every community of the nation by state constitutions is imperiled. If the First Amendment forbids to religious organizations the incidental use of school property for holding religious meetings (when the school is not being used for school purposes) by force of the same reason it also denies authority to the states in their constitutions and the Congress in the District of Columbia to grant tax exemption to religious organizations and churches.

In both cases it is the use of state funds. In the case of tax exemption to religious organizations the use of state funds is greater and bears more heavily upon the people than does the incidental use of a school auditorium as a place of assembly for worship.

Should the principle approved by the courts below and the executive board represented by respondents be sanctioned by this Court, then an opening wedge has been driven to split asunder and upset completely the holdings of this Court that the streets and parks, which are publicly maintained by the state, can be used for public preaching.

This Court has held in many cases that the street preaching of Jehovah's witnesses by distribution of literature upon public property is protected by the freedom of religion provision of the First Amendment. The principle advocated by the respondents and approved by the courts below, if extended, which it must be if accepted, would forbid the use of public streets and parks for the distribution of religious literature and preaching by ministers and missionaries, which this Court has held to be constitutional.

The approval of the principle that separation of church and state precludes the incidental use of public property by a religious organization to preach presents a national anomaly. It has produced a grotesque inconsistency that affects the rights and liberties of all of the people of the nation. Should that principle be allowed to stand, the people of

the nation will not know what is protected and what is prohibited by the First Amendment.

The guarantee of freedom of religion in the First Amendment needs to be defined so that the doctrine of separation of church and state may have its boundaries fixed. That has not yet been done by this Court. The existing inconsistency is confusing. The ambiguity in the First Amendment, as it has been interpreted and construed by the respondents and the courts below, should be terminated through an immediate clarification by this Court.

This case is now ripe for decision. It is not moot. See *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498; *Leonard & Leonard* v. *Earle*, 279 U. S. 392; *Federal Jurisdiction to Decide Moot Cases*, 94 U. of Pa. L. Rev. 125-147. Nor is the case "too moribund for adjudication". *Darr* v. *Burford*, 70 S. Ct. 587, 602 (Mr. Justice Frankfurter, dissenting). This case is important beyond its particular facts and parties. A much larger class of people is involved. If the doctrine of separation of church and state keeps Jehovah's witnesses out of the school buildings, *a fortiori* the doctrine closes the door to all religious organizations. Not only are Jehovah's witnesses and the respondents concerned, but all religious organizations and school boards throughout the nation are concerned.

There is presently existing a nation-wide controversy between the school boards of many states of the nation and many religious organizations over whether the First Amendment (as claimed by the respondents) makes mandatory the denial of the use of school auditoriums to religious organizations under civic center acts or custom and usage permit school buildings to be used as places of assembly. No good will come to the people, states or the nation by awaiting "the perspective of time", because time will not "soon bury the question". *Darr* v. *Burford*, 70 S. Ct. 587, 602 (Mr. Justice Frankfurter, dissenting). Delay will merely exacerbate the epidemic until it becomes a

national scourge ultimately requiring a resurrection of the dead before the Court.

II

The holdings by the Supreme Court of Ohio, the Court of Appeals of Ohio and the Common Pleas Court are in conflict with *Hannegan* v. *Esquire*, 327 U. S. 146, holding that a privilege, as distinguished from a right, may not be taken away from a person on arbitrary and capricious grounds.

Sections 4839-1 and 4839-2 of the Ohio General Code grant the privilege to religious organizations to use school buildings for places of assembly, when applied for by a responsible organization or by seven citizens. The application was made by a congregation of 90 persons acting through a committee.

It should be noted that Section 4839-1 of the Ohio General Code does not specify or require a *written* application. The statute uses the term "upon application". Since it was not required that the application be in writing, there is nothing to compel the written application by the committee to be signed by seven citizens. The committee was acting for the East Unit of Toledo Company of Jehovah's witnesses, and the Watch Tower Bible and Tract Society.

The evidence showed that the East Unit was composed of 90 persons residing in Toledo. These persons, it must be assumed, are citizens of Ohio. Inasmuch as the evidence shows that the applications were made by a committee in behalf of 90 persons residing in Toledo, it must be concluded, when the statute is given a reasonable and fair interpretation, that the application was made in behalf of seven citizens within the meaning of Section 4839-1 of the Ohio General Code.

The effort of respondents to defeat the application on the ground that it was not signed by seven citizens failed

because the court of appeals held that the application need not be in writing. (16)

Even assuming, for the purpose of argument, that the applications were not made by seven citizens, they were nevertheless made by and in behalf of "a responsible organization" within the fair meaning of that term as used in Section 4839-1 of the Ohio General Code. The evidence showed that the Toledo East Unit of Jehovah's witnesses constitutes a "responsible" organization. From this evidence it must appear that the applications were made by a financially responsible organization. Also the applications were made by a responsible organization when that term is used in its broader or proper sense.

While it is true that Jehovah's witnesses may hold views that are unorthodox or strange and even repulsive to some people, they, nevertheless, constitute a responsible organization. There is no requirement of orthodoxy in morals or belief in determining what is "responsible".

Therefore, inasmuch as the Toledo East Unit of Jehovah's witnesses is a religious organization and a part of a large international organization, when the word "responsible" is given its broader sense, it appears that the petitioners are a responsible organization.

The undisputed evidence before both the board of education and the courts below shows that the petitioners intended to use the auditorium of the school for "religious exercises" and "for holding . . . religious . . . meetings . . . and for such other purposes as may make for the welfare of the community." (Sections 4839-1, 4839-2, General Code of Ohio) The undisputed evidence showed that the " . . . meetings . . . shall be non-exclusive and open to the general public." (Section 4839-2)

Therefore the petitioners respectfully submit that the applications, both oral and written, were made in the form and in the manner required by law, which places upon the

respondents the performance of a duty to issue the permit which was specifically enjoined by law.

The holdings of the courts below that petitioners do not constitute a responsible organization because of their dissentient beliefs, unorthodox practices, conscientious objection to military service, refusal to salute the flag and to serve on juries or vote, (none of which, according to the record, are discussed at public meetings in school auditoriums) should be rejected by the Court because the right of Jehovah's witnesses to hold such opinions and engage in such practices has been approved by decisions of this and other courts.

This Court has held that dissentient beliefs and practices of, and the assault by, Jehovah's witnesses upon the orthodox religions were not grounds for denial of liberty guaranteed in the Bill of Rights. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115-116; *Cantwell* v. *Connecticut,* 310 U. S. 296, 310.

The right to have conscientious objections to the performance of military service is no basis for the penalty here imposed. See Section 5 (g) of Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 305); Section 6 (j) of Selective Service Act of 1948 (62 Stat. 609, 50 U. S. C. App. 456). Even the privileges of citizenship may not be denied because of possession of conscientious objection to military service. *Girouard* v. *United States,* 328 U. S. 61.

Jehovah's witnesses may not be denied the privilege of receiving free state education because of their refusal to salute the flag. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624.

In *United States* v. *Hillyard,* 52 F. Supp. 612 (E. D. Wash.), the right to be exempt from jury duty by one of Jehovah's witnesses was declared by Judge Schwellenbach.

The position here taken, that the decisions of the courts below and the rule of the respondents, as representatives

of the school board, are in conflict with the holding of the Court in *Hannegan* v. *Esquire* (327 U. S. 146), is supported by the Supreme Court of California in *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885. In that case the action was for mandamus to compel a school board to grant permission to use a school auditorium without condition that the petitioners sign a loyalty oath. Petitioners refused to take the oath. They contended that the oath statute was void on its face because it abridged the Constitutions of California and of the United States.

The Supreme Court of California held that the action of the school board in refusing the permit because of the petitioners' refusal to sign the loyalty oath was an abridgment of the right of freedom of speech and assembly, contrary to the First and Fourteenth Amendments. The court, among other things, said:

"The state is under no duty to make school buildings available for public meetings. (See 86 A.L.R. 1195, 47 Am. Jur. 344) If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. (*Missouri* ex rel. *Gaines* v. *Canada*, 305 U. S. 337, 349; *Marsh* v. *Alabama*, 326 U. S. 501.) Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. (*Frost* v. *Railroad Commission of California*, 271 U. S. 583, 594; *Hague* v. *CIO*, 307 U. S. 496, 515; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110-111; . . .

"Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. . . .

"There is a parallel between the privilege in question and the privilege of using the mails at less than cost. In

Hannegan v. *Esquire*, 327 U. S. 146, Mr. Justice Douglas speaking for the court declared: 'But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever.' See the dissents of M. Justice Brandeis and Mr. Justice Holmes in *United States* ex rel. *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 421-423, 430-432, 437, 438."

The decision in *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885, is so closely in point and so strongly supports the position taken here by petitioners that the Court is referred to the opinion and requested to read the marked parts in the printed slip copy of that opinion accompanying this petition. See the marked parts on pages 1, 2, 3, 5, 9 and 10 of the printed slip copy of opinion.

III

The decisions below fail to give proper effect to applicable decisions of this Court and are out of harmony with principles announced in decisions of this Court involving the doctrine of separation of church and state that is implicit in the First Amendment to the Constitution.

It is well settled that the use of school auditoriums (when not in use for school purposes) by religious organizations for religious services and assemblies for worship, does not constitute a sectarian use in violation of the doctrine of separation of church and state. The greater weight of authority holds that the religious use of the school auditoriums in such circumstances is so slight and inconsequential as not to violate the doctrine of separation of church and state. See *Nichols* v. *School Directors* (1879) 93 Ill. 61; *School Directors* v. *Toll* (1909) 149 Ill. App. 541; *Hurd* v. *Walters* (1874) 48 Ind. 148; *Baggerly* v. *Lee* (1905) 37 Ind. App. 139, 73 N. E. 921; *Townsend* v. *Hagan* (1872) 35 Iowa 194; *Davis* v. *Boget* (1878) 50 Iowa 11; *Gibbert* v.

Dilley (1914) 95 Neb. 527, 145 N. W. 999; *Greenbanks* v. *Bantwell* (1870) 43 Vt. 207; *Lagow* v. *Hill* (1909) 238 Ill. 428, 87 N. E. 369.

Other state decisions relating to this problem are interestingly collated and discussed in 5 A. L. R. 886, 7 A. L. R. 791, 52 A. L. R. 249, 86 A. L. R. 1181, and 161 A. L. R. 1308.

The position here taken by petitioners is supported by a decision on May 29, 1948, by the Court of Appeals of the Republic of the Philippines in the case of *The People of the Philippines* v. *Florencio Fernandez, et al.*, reported in 1948 Lawyers Journal 295. That case involved the use of a public building by Jehovah's witnesses. That use was sustained and held not to be a violation of the Constitution forbidding the use of public money or property for sectarian and religious purposes.

A printed slip copy of the opinion is submitted with this petition. The marked parts thereof are referred to the Court for its consideration along with this petition.

The logic, reasoning and analogy of the above decisions which are squarely in point so far as the use of the school auditorium at Grand Rapids, Ohio, by petitioners is concerned, bring them squarely within the holding of *Everson* v. *Board of Education of Ewing Township*, 330 U. S. 1. The holdings of the courts below are out of harmony with and have failed to give proper effect to *Everson* v. *Board of Education of Ewing Township* (330 U. S. 1) as to the scope of the doctrine of separation of church and state that is to be found implicitly in the First Amendment.

Reliance has been placed by respondents upon *McCollum* v. *Board of Education*, 333 U. S. 203. This decision is not authority against petitioners. The principle of the *McCollum* case is limited to a constitutional prohibition of the use of school time and the course of instruction given the children through the compulsory education law to teach

religious doctrines, creeds and principles. *McCollum* v. *Board of Education,* 333 U. S. 203, 205, 209.

The issue in the *McCollum* case was confined to the precise problem of utilization of the compulsory education process and school system for religious training. It was not based upon the proposition that public property cannot be used for the exercise of constitutional rights by religious bodies. If this Court so held it would have so stated explicitly. If a public school building dedicated by law and regulation to community purposes by the directors of a board of education (making it like a public park) cannot be so used by a religious group, then by force of the same reason a public street or a public park could be kept back from use by a religious group. The doctrine of separation of church and state ordained in the First Amendment must not be distorted so as to itself become an abridgment of liberty. It would result in just that if the construction of the Constitution by the respondents is not corrected here.

The doctrine must not be stretched beyond the breaking point. Since the public streets and public parks cannot be withheld from religious organizations for exercise of their constitutional rights of free speech (*Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *New Jersey,* 308 U. S. 147; *Jamison* v. *Texas,* 318 U. S. 413; *Marsh* v. *Alabama,* 326 U. S. 501) then public schools that have been opened for community meeting purposes by the legislature of Ohio may not be denied to petitioners for such purposes.

The petitioners bring themselves within the doctrine of *Everson* v. *Board of Education of Ewing Township,* 330 U. S. 1, and they are not precluded from relief that they were seeking by the holding of this Court in *McCollum* v. *Board of Education,* 333 U. S. 203.

IV

The decisions below fail to give proper effect to and are out of harmony with applicable decisions of this Court as to equal justice under the law.

It is well settled that discrimination is a violation of the Constitution. The permitting of harmonious joint religious groups to use the auditorium in question for religious services, while denying such use to Jehovah's witnesses, constitutes a denial of the equal protection of the laws required by the Fourteenth Amendment.

This discrimination by the administrative agency and the approval thereof by the courts below are out of harmony with and are in conflict with *Skinner* v. *Oklahoma*, 316 U. S. 535, and *Yick Wo* v. *Hopkins*, 118 U. S. 356.

It is petitioners' privilege to make use of the school building. It is respondents' unequivocal duty to make the school building available to all classes of religious groups. It must be remembered that the legislature of Ohio did not intend to confer arbitrary, unfair or capricious power on the board of education.

V

The decisions below fail to give proper effect to and are out of harmony with the applicable decisions of this Court as to the right to make use of appropriate public places in the exercise of civil liberties guaranteed by the First and Fourteenth Amendments.

The courts below approved the state administrative determination by the respondents that there were other appropriate and available public places in Grand Rapids where meetings could be held.

The evidence shows that there is a town hall in Grand Rapids. Also it appears that there is a park owned by the village on which are situated a number of picnic houses. It is contended that Jehovah's witnesses have no right to

make use of the school auditorium as long as these places are available.

This is a very specious contention. If this were the true principle of law, then every person who is also approached for permission to use an auditorium in a school district would refuse such permission on the ground that there are other places available. Thus the applicant would be on a merry-go-round and an endless chase of hide-and-seek that would wind up in total frustration of his desire to hold public meetings in the school district.

If a public park or a public building is available it can not be denied on the ground that there are other appropriate places that may be used. This type of reasoning has been rejected by this Court in *Schneider* v. *New Jersey*, 308 U. S. 147. There, at page 162, the Court said: "But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

VI

The decisions below fail to give proper effect to applicable decisions of this Court as to the duty of state courts to grant relief protecting the exercise of civil liberties.

This Court has said that "Upon the state courts equally with the courts of the Union rests the obligation to guard and enforce every right secured by that Constitution. In view of the dominant requirement of the Fourteenth Amendment we are not at liberty to assume that the State has denied to its courts jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose." *Mooney* v. *Holohan*, 294 U. S. 103, 113. See also *Robb* v. *Connolly*, 111 U. S. 624, 637.

The petitioners have a constitutional right to use the

school auditorium because it has been opened by statute. The deprivation of the right is a denial of freedom of worship and assembly contrary to the equal protection clause of the Fourteenth Amendment. Where a right guaranteed by the Constitution has been violated, and there is no other remedy to redress the deprivation except by mandamus, the writ must issue. *United District Heating, Inc.* v. *State Office Building Commission*, 124 Ohio St. 413, 415-416.

It was said in *Weaver* v. *Ohio State University*, 126 Ohio St. 290, 185 N. E. 196, that where there was a violation of a constitutional right and no other remedy was available, the writ of mandamus must issue. There is no legal remedy outside of the writ of mandamus available to petitioners. *First Nat'l Bank* v. *Botkins*, 141 Ohio St. 437, 250 O. O. 576, 48 N. E. 2d 865.

The Constitution of Ohio and the Constitution of the United States guarantee freedom of speech and peaceable assembly. (*Hague* v. *C. I. O.*, 307 U. S. 496; see also 21 MINN. L. REV. 744) The right of assembly cannot be effectively expressed without the use of public auditoriums and other meeting places. It was for the purpose of enabling the public schools to have a part in increasing such places of assembly that the legislature of Ohio passed the law which authorized the members of the boards of education to permit school buildings to be used as places of assembly. Prior to the enactment of the sections of the General Code of Ohio authorizing the use of school buildings for public meeting purposes there was no duty on the part of the school board or board of education to permit the use of school property for uses other than school purposes. *Weir* v. *Day* (1878) 35 Ohio St. 143.

In *Homan* v. *Board of Embalmers and Funeral Directors*, 135 Ohio St. 321, the act provided for the licensing of embalmers. The rule of the board required all applicants for renewal of licenses who, prior to the enactment had

not matriculated in an accredited school of embalming, to undergo a two-year apprenticeship in embalming and show proof of having handled in such apprenticeship a certain number of embalmed bodies. They required this of renewals which was the requirement for students and original applicants for embalming license in the General Code. The mandamus was held properly issued.

In order to constitute an abuse of discretion, it must appear that it was exercised on grounds, or for reasons, clearly untenable, to an extent clearly unreasonable. *Mutual Home and Savings Assn.* v. *Merion*, 67 Ohio App. 439, 37 N. E. 2d 109, 119.

The case of *Bigelow* v. *Spiegel*, 22 O. C. C. N. S. 337, 43 O. C. C. 595, is directly in point. It involved the refusal to issue a permit to hold an assembly and parade on the streets of Cincinnati, Ohio. The mandamus was prayed for to compel the issuance of the permit. The court held that the power of the city was to regulate and that a refusal must be reasonable and not arbitrary. It was shown that the refusal was not based on the exercise of discretion but was arbitrary, whimsical, actuated by bias and prejudice toward the relator and his cause and that there was no basis for fear of disturbance or public inconvenience from holding the meeting. It was shown that permits were freely and frequently granted to other persons and organizations. Such evidence, it was held, constituted grounds for the issuance of the writ of mandamus.

It is well settled that relief by mandamus will be granted against administrative officials when their duty is plainly described so as to be free from doubt and equivalent to a positive command. *Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 543; *Wilbur* v. *United States*, 281 U. S. 206, 218-219; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577.

The "supposed" discretion of respondents was exercised to an end or purpose not justified by the law and clearly against the decisions of this Court, which define the fun-

damental law of the land, and clearly establish an arbitrary and capricious abuse of discretion. This Court commanded the issuance of a writ of mandamus against the Board of Education in the case of *McCollum* v. *Board of Education,* 333 U. S. 203. In that case the Court reversed the holdings of the Illinois court and remanded the case for further proceedings consistent with this Court's opinion. 333 U. S. at page 212.

CONCLUSION

For the foregoing reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 2, New York

Counsel for Petitioners

Dated, June 24, 1950